NOT REPORTABLE /BH

DELIVERED: 3 JUNE 2008

IN THE HIGH COURT OF SOUTH AFRICA
TRANSVAAL PROVINCIAL DIVISION

CASE NO: 11860/2006

INGRID ROTHAUGE	APPLICANT
AND	
NEDBANK LIMITED	FIRST RESPONDENT
JACOBUS M VAN STADEN	SECOND RESPONDENT

JUDGMENT

SERITI, J

1. INTRODUCTION

This matter came to court by way of motion.

In the notice of motion, the applicant is asking for an order setting aside the default judgment granted against her by this court on 19 May 2006. She is also asking for an order prohibiting the Registrar of Deeds from transferring a certain property therein described pending the finalisation of this application.

2. FOUNDING AFFIDAVIT

In the founding affidavit, the applicant alleges that this application is for the setting aside of the default judgment, in the amount of R491 675-92 obtained by the first respondent against her on 19 May 2006.

She further alleges that on 13 April 2006 the first respondent issued summons against her for payment of the amount of R491 675-92, being balance of money owing by her, arising out of a written loan agreement and a mortgage bond.

The summons issued by the first respondent was served on the chosen *domicilium* address, which is an empty plot. She did not oppose the action and consequently the first respondent obtained default judgment as mentioned above.

On 2 June 2006 first respondent issued a warrant of execution against the immovable property. It was re-issued on 4 December 2006.

On 1 August 2007 first respondent issued notice of sale in execution

and on 7 September 2007 the attached property was sold to the second respondent for an amount of R511 000-00.

Prior to the issue of summons against her and on 20 February 2006 the first respondent sent her a letter of demand, which letter she received on 6 April 2006. In the said letter, first respondent was demanding arrears of R15 930-31. On receipt of the said letter, she spoke to Mr Zaid, who informed her that the outstanding arrears is R21 278-00 and that she must pay at least R11 000-00 before the end of April 2006 and the balance of R11 000-00 before the end of May 2006.

On 25 April 2006 she paid R11 000-00 and the balance was paid on 30 May 2006. At some stage, the manager of Buffelsdrift Estate, where her property was situated informed her that a summons dated 21 April 2006 was picked up two days ago.

On receiving the summons she telephoned a certain lady called Louise who is employed by the first respondent's attorneys of record who informed her that the summons were served on the chosen *domicilium* as it appears on

the mortgage bond.

She attempted to sell the property without success.

On 7 February 2007 she spoke to a certain Joyce employed by first respondent. She informed the latter that se will receive money in the middle of February and on receipt thereof, she will be in a position to bring her account up to date. Joyce informed her that the arrears amount to R60 212 and that she must pay R21 075-00 and the balance in 12 equal payments of R10 490-00 per month from March 2007.

On 16 February 2007 she paid an amount of R21 975-00 and paid further amounts of R10 490-00 at the end of March 2007 and R10 500-00 at the end of April, May, 2 July and 30 July 2007.

When she spoke to Joyce as mentioned above, she was not aware of the fact that auction was going to take place and that a warrant of execution was issued on 4 December 2006. In fact, on 12 March 2007 Joyce informed her that the auction was going to be stopped as she has made payments. She

also spoke to a lady called Lucy who then confirmed what Joyce told her about the stopping of the auction.

During July 2007 she spoke to Mr Brummer, the manager of Buffelsdrift Nature Reserve, and the latter informed her that the property was auctioned on 7 September 2007.

The property was sold at the auction for an amount of R511 000-00 and the market value of the property was at least R850 000-00. The registered mortgage bond was for an amount of R136 800-00.

The launching of this application was further delayed by the fact that the transferring attorney of second respondent refused to provide her attorneys with details of the second respondent. The Sheriff also adopted the same attitude and the said information was made available only after threats of an application were made.

3. FIRST RESPONDENT'S ANSWERING AFFIDAVIT

It was attested to by Ms (Mr) Kayoori Chiba, a Senior Manager of the First Respondent.

He alleges that the applicant has elected to launch an application for rescission of a judgment 16 months after the judgment was granted.

The summons was served at the *domicilium citandi et executandi* as it appears on the mortgage bond on 26 April 2006.

The initial warrant of execution was uplifted and thereafter a second one was issued on 4 December 2006. As at 2 February 2006 the applicant was in arrears in the amount of R21 278-48. On 25 April 2006 the applicant paid an amount of R11 000-00. An amount of R4 200-00 was allocated to the May 2006 instalment as per the loan agreement and R6 800-00 was allocated towards her arrears. She failed to pay an amount of R11 000-00 towards her arrears.

The applicant failed to pay her monthly instalments and the first respondent was entitled to instruct the sheriff to attach the property in terms

of the default judgment. It is correct that on 7 February 2007 the applicant made certain arrangements with Joyce. The applicant undertook to pay the amount of R21 075 on 8 February 2007 but only paid the said amount on 16 February 2007.

The applicant failed to honour her undertaking to settle the arrears as:

1. The amount of R21 075-00 was paid 8 days after it should have been paid.
2. The applicant did not pay the June 2007 monthly payment during June 2007 as she should have and only made the payment on 2 July 2007.

3. The applicant stopped making payments after July 2007 payment. She did not make any payment for August 2007 or September 2007 and thus, the sale in execution had to proceed in September 2007.

In February 2007, the sale in execution scheduled for 9 March 2007

was cancelled as agreed, and the applicant was given an opportunity to honour her undertaking to pay R21 075-00 immediately and to pay an amount of R3 262-00 in addition to her regular monthly instalments for the next twelve months.

The indulgence granted to the applicant was subject to, as the applicant state that "die agterstand en huidige paaiement in plek sou wees". It was also agreed that if the applicant did not strictly adhere to the agreement the first respondent would proceed again with the execution steps. Applicant failed to make any payment in August 2007 and September 2007.

Further amounts were advanced to the applicant and that is why the applicant is not disputing the amount of the judgment.

Applicant made request for the details of second respondent only on 26 November 2007. First respondent's attorneys were entitled to withhold information about second respondent from the applicant.

The applicant was aware of the judgment from at least 30 June 2006.

A confirmatory affidavit deposed to by Ms Louise Keese was attached.

In the said affidavit she denies that there were any telephone conversations between the applicant and her on 14 August 2006 and 17 November 2006.

4. APPLICANT'S REPLYING AFFIDAVIT

It was deposed to by the applicant. She alleges that first respondent undertook not to proceed with the execution, and consequently there was no reason at that stage for her to launch an application for rescission of the default judgment. She was compelled to launch this application after the first respondent proceeded with the sale in execution.

At no stage did she undertake to pay money on 8 February 2007, but she did undertake to make payment in mid February 2007.

Despite the fact that she made payment on 30 July 2007, the first respondent's attorneys issued the notice of sale on 1 August 2007.

From the time of default judgment being granted against her, she paid a total of R90 000-00, and the first respondent has failed to take that amount into consideration.

She further alleges that: "Ek het reeds gemeld dat daar 'n ooreenkoms was oor die terugbetalings, en ek het dit nie nodig geag om 'n aansoek om tersydestelling te doen nie." She further alleges that she started seeking legal assistance after learning that the property was sold contrary to their agreement.

5. FINDINGS

The summons was issued on 21 April 2006 and served on the *domicilium citandi* on 26 April 2006.

Applicant failed to enter appearance to defend, and on 19 May 2006 default judgment was granted against the applicant.

It is also apparent from the papers, that when summons were issued, the applicant was in arrears with her monthly instalments, contrary to their loan agreement.

At best for the applicant, on 30 June 2006 she was aware of the default judgment obtained against her and she launched the current application on 7 December 2007, which is about 17 months after she first became aware of the default judgment granted against her.

In her replying affidavit she stated that she did not deem it necessary to apply for rescission of the default judgment as she had arrangements in place to repay the outstanding arrears and the capital amount.

The applicant was prepared to live with the default judgment granted against her. She applied for the rescission of the default judgment after her property was sold in a sale in execution. Rule 31(2)(b) provides that a

defendant may within twenty days after he or she has knowledge of default judgment granted against him/her/it, apply to court upon notice to the plaintiff to set aside such judgment and the court may, upon good cause shown, set aside the default judgment on such terms as to it seems meet.

The application of the applicant does not comply with the time frames stipulated in Rule 31(2)(b) mentioned above as the application was launched, about 16 months after she became aware of the default judgment.

The applicant's counsel submitted *inter alia*, the applicant's application can be accommodated within the provisions of Rule 42(2)(a). There is no evidence before this court that the default judgment was erroneously sought or erroneously granted. It is common cause between the parties that when summons were issued, the applicant was in breach of her loan agreement and consequently the plaintiff (first respondent in this application) was entitled to issue summons against the applicant. The summons was served at the chosen *domicilium* and the applicant failed to enter appearance to defend. The court was entitled to grant default judgment as it did.

The applicant's counsel further submitted that if their application cannot be accommodated under rules 31 or 42, they rely on the common law.

In *De Wet & Others v Western Bank Ltd* 1977 (4) SA 770 (T) at 776F Melamet J said:

> "Before a judgment would be set aside under the common law, an applicant would have to establish a ground on which *restitution in integrum* would be granted by our law, such as fraud or *justus* error in certain circumstances."

In the papers, the applicant has not made out a case for the setting aside of the default judgment in terms of the common law.

As stated earlier, the applicant was prepared to live with the default judgment granted against her. She launched the application to set aside the default judgment after realising that the property in question was sold in a

sale in execution.

There is no application by the applicant for condonation of the late filing of this application. As stated above, the time frames stipulated in rule 31(2)(b) have not been complied with, and on the facts of this case, the applicant cannot rely on Rule 42 of the Uniform Rules of Court nor the common law. The application has no merits and same should fail.

The court therefore makes the following order:

1. The application is dismissed.

2. The applicant is ordered to pay the costs of the first respondent on a party and party scale.

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JWL SERITI
JUDGE OF THE HIGH COURT

Heard on : 23 May 2008
Applicant's counsel: J G Van der Berg
Instructed by: P J Kleynhans Attorneys
First respondent's counsel: T Pillay
Instructed by: Stegmanns Attorneys.